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Can WTO Member States Rely on Citizen Concerns to Prevent Corporations from Importing Goods Made from Child Labour?

Aleydis Nissen*

1. Introduction

The Dutch Government has tried to mobilise other European Union Member States to eliminate the ‘worst forms of child labour’ in third states by means of unilateral trade-related restrictions (alongside appropriate accompanying measures).¹ The UN Committee on the Rights of the Child (CRC) has also weighed in on import bans on products that have been produced using child labour in third states in a remarkable series of 2011 Concluding Observations. To begin with, the CRC explained that it regretted that there were no restrictions for corporations to import or sell goods in Finland that were produced using child labour in third states.² Furthermore, the CRC stressed that Italy should use its leverage as an EU Member State to ensure that cotton originating from child labour does not enter the European market.³ Finally, the CRC suggested that import restrictions might be required with regard to products from third states that are investigated by the International Labour Organisation (ILO) for using child labour in its Concluding Observations for the Republic of Korea.⁴ The CRC recommended the observed state to ‘use its trade agreements and national

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- 1 The Netherlands, ‘Dutch Non-Paper on Child Labour’ (2010), European Parliament, <http://www.europarl.europa.eu/meetdocs/2009_2014/documents/droi/dv/201/201005/20100510_2_2non-paperfinal_en.pdf> (last visited 22 January 2018), p. 1; The Netherlands (*Directie Multilaterale Instellingen en Mensenrechten*), ‘Uw Verzoek inzake Initiatiefnota van het lid Van Laar over het Verbieden van Producten gerelateerd aan Kinderarbeid’ (2014), Minbuza-2014.453878, p. 1. The ‘worst forms of child labour’ include forced and hazardous labour (Art. 3 1999 ILO Convention C182: Worst Forms of Child Labour Convention (Convention concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour), 2133 United Nations Treaty Series, p. 163). Forced child labour includes all forms of slavery or practices similar to slavery including debt bondage, serfdom, forced or compulsory labour or compulsory recruitment of children for use in armed conflict, and the sale or trafficking of all persons under the age of 18. Non-forced ‘hazardous’ work jeopardises the health, safety or morals of any child under 18 years. Some categories of hazardous work have been pointed out by the ILO (Arts. 3-4 ILO, Recommendation R190, Worst Forms of Child Labour Recommendation (Recommendation concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour) (87th Conference Session Geneva 17 June 1999)). But, it remains ultimately up to ratifying State Parties to determine the circumstances in which work is considered hazardous by national laws or regulations after consultation with the organisations of employers and workers concerned (Art 4.1 ILO Convention 182, *ibid.*).
- 2 CRC, Consideration of Reports submitted by States Parties under Art. 44 of the Convention. Concluding Observations: Finland, UN Doc. CRC/C/FIN/CO/4 (2011), para. 23.
- 3 CRC, Consideration of Reports submitted by States Parties under Art. 44 of the Convention. Concluding Observations: Italy, UN Doc. CRC/C/IT/A/CO/3-4 (2011), paras. 20-21.
- 4 CRC, Consideration of Reports submitted by States Parties under Art. 44 of the Convention. Concluding Observations: Republic of Korea, UN Doc. CRC/C/KOR/CO/3-4 (2011), paras. 26-27. The CRC inserts itself in the work of the ILO by relying on Art. 32 1989 Convention on the Rights of the Child, 1577 United Nations Treaty Series, p. 3. This article indicates that relevant provisions of other international instruments should be taken into account when State Parties to the Convention take measures to protect children from economic exploitation and from performing any work that is likely to be hazardous, to interfere with their education, or to be harmful to their health or physical, mental, spiritual, moral or social development.

legislation' in order to prevent imports of products of non-forced child labour and to monitor products that entered the market in order to prevent market access for products of forced child labour.

Import restrictions may appear an attractive solution for states which are increasingly expected (or obliged) to rein in 'home' corporations in their jurisdiction when they violate children rights in third states.⁵ Such measures allow states to create an artificial level playing field which enforces the same child labour standards across both national and foreign corporations that operate in its market.⁶ No state individually wishes to impose a heavy burden on its 'own' corporate nationals in order to maintain short-term business opportunities.⁷ Losses of output and market share are some of the (perceived and real) immediate compliance costs that these corporations might suffer if competitors from other states do not have to live up to the same standards in their market.

The issue of trade and labour rights is, however, contested. There has been a long debate on whether labour standards might justify trade restrictive measures. The debate has focused on two issues: the effectiveness of such measures and the question whether the comparative advantage of developing and emerging states in the global marketplace is influenced. The separate development of international labour standards in the ILO and trade regulation in the WTO is symptomatic of this debate.

State Parties to the GATT might have limited ability to impose import restrictions on products of child labour.⁸ Some authors have argued that those states that wish to impose import restrictions can sidestep the difficult issues that arise in the debate on a social clause when their citizens would object against the presence of products of child labour in the marketplace. They have relied on the WTO DSM's interpretations of Article III(4) GATT in the *Asbestos* case (2001) and Article XX(a) GATT in the *Seal* case (2014).⁹

They have, however, largely overlooked the role of the attitude-behaviour gap – the behavioural phenomenon of people's actions not correlating with their attitudes – under the WTO DSM's interpretation. Behavioural economists have extensively studied the barriers which cause or influence people not to follow through their values or beliefs. Without an assessment of the attitude-behaviour gap in the WTO's case law, it is not possible to determine whether citizen concerns that are not reflected in consumption decisions might justify import restrictions under the WTO regime. This essay, therefore, undertakes to investigate whether and to what extent the attitude-behaviour gap is taken into account by the WTO DSM.

This essay has two parts. The second section summarises the ongoing debate on the linkage between trade and child labour. The arguments raised against and in favour of trade restrictive measures as a means to increase corporate accountability are set out. It is also indicated that such measures – if desirable at all – can

5 There is growing recognition of extraterritorial obligations over private corporations. The CRC, General Comment 16 on State Obligations regarding the Impact of the Business Sector on Children's Rights, UN Doc. CRC/C/GC/16 (2013), paras. 39-43 stresses, for example, that State Parties have obligations to engage in international cooperation for the realization of children's rights beyond their territorial boundaries. In doing so, the CRC resorted to the concept of international cooperation, which is enshrined in Art. 4 1989 Convention on the Rights of the Child, 1577 United Nations Treaty Series, p. 3. The CRC determines whether there is a 'reasonable nexus' between the State Party and the corporate conduct abroad to determine whether such 'extraterritorial' obligations exist. In light of the current analysis, it suffices to stress that most pronouncements of the CRC and other treaty bodies regarding extraterritorial obligations focus exclusively on the relationship between states and corporations that have their 'home' in their jurisdiction and which violate children's rights in third states to determine such a nexus. The cited 2011 Concluding Observations of the CRC were remarkable precisely because they take a broader approach. The CRC focused in these documents also on the relationship between states and *all* corporations that import goods in their respective markets. For a discussion on extraterritorial human rights obligations see, amongst others. F. Coomans & M. Kamminga, *Extraterritorial Application of Human Rights Treaties* (2004); O. De Schutter et al., 'Commentary to the Maastricht Principles on Extraterritorial Obligations of States in the area of Economic, Social and Cultural Rights', (2012) 34 *Human Rights Quarterly*, no. 4, pp. 1-34; M. Langford et al. (eds.), *Global Justice, State Duties. The Extraterritorial Scope of Economic, Social and Cultural Rights in International Law* (2013).

6 H. Ward, 'Trade and the environment in the Round – and After', (1994) *Journal of Environmental Law*, no. 6, p. 270.

7 O. De Schutter, 'The Accountability of Multinationals for Human Rights Violations in European law', (2004) *Centre for Human Rights and Global Justice Working Paper*, no. 1, <<http://chrgj.org/wp-content/uploads/2012/07/s04deschutter.pdf>> (last visited 28 July 2016), p. 10. It should be noted here that there is currently no international agreement that determines when a corporation that operates transnationally can be deemed to be a 'national' of a country under international law. The nationality of corporations depends on the criteria that each sovereign country sets individually. These criteria include the nationality of the owners, the location of 'incorporation' and the location of the main office. The criteria of one country can thus overlap with the criteria of another country. (See C. Ryngaert, 'Extraterritorial Export Controls (Secondary Boycotts)', (2008) 7 *Chinese Journal of International Law*, no. 3, p. 627).

8 1994 General Agreement on Tariffs and Trade (GATT), 1867 United Nations Treaty Series, p. 187.

9 WTO, *European Communities: Measures Affecting Asbestos and Products Containing Asbestos – Report of the Appellate Body* (12 March 2001), WT/DS135/AB/R; WTO, *European Communities: Measures Prohibiting the Importation and Marketing of Seal Products – Report of the Panel* (25 November 2013), WT/DS400/R and WT/DS401/R; WTO, *European Communities: Measures prohibiting the Importation and Marketing of Seal Products Report of the Appellate Body* (22 May 2014), WT/DS400/AB/R and WT/DS401/AB/R.

only be imposed if they serve as a last resort mechanism and if they are accompanied by other appropriate measures. The third section revisits the case law of the WTO DSM to determine whether import restrictions (and accompanying measures) on products of child labour can unilaterally be imposed, looking through the lens of the attitude-behaviour gap. It is first determined that import restrictions are likely to be inconsistent with the imposing states' obligations under the WTO DSM's interpretation of Article III(4) GATT, which prohibits discrimination by a State Party between similar domestic and imported products in a way that treats imported products less favourably. It is then assessed whether such restrictions would be allowed if they are framed as measures to protect the public morals of the population in the imposing State Party under paragraph (a) of Article XX GATT. The *Seals* case – the first substantive interpretation of this exception clause – is analysed to this end.

2. Current state of the debate on import restrictions on products from child labour

This section assesses the debate on the link between trade and child labour. The question whether the comparative advantage of developing and emerging states is influenced is evaluated. The main arguments regarding the effectiveness of import restrictions are also set out. Finally, it is observed that the old dichotomy between economically developed states and other states in this debate has faded.

Why is the debate on a linkage between trade and child labour so contested? Two issues are central to this debate. First, import restrictions would deprive developing and emerging states of a comparative advantage in the global marketplace.¹⁰ Jurisdictions that are economically and legally less developed have the advantage that goods can be produced at a lower opportunity cost by less skilled workers. Indeed, it seems to be likely that those economically developed states that would impose import restrictions on products of child labour would not be doing so for purely 'altruistic' motivations.¹¹ Economically developed states have an interest in taking away the comparative advantage of other states – currently, in particular, Asian hegemonic states – which have an increasing influence on the global stage.¹² This activity can at least partly be labelled a form of disguised protectionism. However, proponents of a social clause argue that self-serving measures do not necessarily have to be of a bad nature as long as they are aligned with the interests of the most vulnerable people on Earth.¹³ But are such measures really aligned with these interests?

This brings us to the second issue. Opponents of a linkage between market access and child labour argue that import restrictions are not a 'means to an end'. They state that import restrictions on products from child labour hamper economic growth and development in developing and emerging countries.¹⁴ Child labour would only be marginally associated with traded goods, but strongly linked to poverty and a lack of education.¹⁵ In addition, they find that import restrictions punish rather than help rights holders. Cutting off access to export markets has a disastrous effect on human rights because this deprives children who live there of employment and an income.¹⁶ Children in developing and emerging markets need jobs to escape from extreme poverty (so the argument goes). Closely related to this is the argument that developed states have reached their current level of economic prosperity because they profited from child labour in the past.¹⁷

The general assumption that child labour would be a positive factor that contributes to economic growth lacks nuance. Although child labour might have some merits as a temporary solution for communities in which adult productivity is so low that families struggle to survive without sending children to work, the

10 S.A. Aaronson, 'Seeping in Slowly: How Human Rights Concerns Are Penetrating the WTO', (2007) 6 *World Trade Review*, no. 3, p. 28.

11 R. Chanda, 'Linking Child Labour with International Trade: Recent Developments and Their Implications', (1997) *IIM Bangalore Research Paper*, no. 102, <https://www.iimb.ac.in/research/sites/default/files/WP.IIMB_102.pdf> (last visited 26 January 2018), p. 13; K. Kolben, 'The New Politics of Linkage: India's Opposition to the Workers' Rights Clause', (2006) 13 *Indiana Journal of Global Legal Studies*, pp. 245-247.

12 J. Nye, *The Future of Power* (2011), p. 204.

13 E.g. R. Hensman, 'How to Support the Rights of Women Workers in the Context of Trade Liberalisation in India', in R. Broad (ed.), *Global Backlash: Citizen Initiatives for a Just World Economy* (2002), pp. 161-162.

14 E.g. J. Langan, 'Did your Jeans Enslave Children? Child Labour in International Trade', (2002) 2 *Asper Review of International Business and Trade Law*, no. 158, p. 170.

15 E.g. European Commission, Staff Working Document Trade and Worst Forms of Child Labour, SWD(2013) 173 final, pp. 7 and 11.

16 E.g. J. Schultz & R. Ball, 'Trade As a Weapon? The WTO and Human Rights-Based Measures', (2007) 12 *Deakin Law Review*, no. 1, pp. 64-65 claiming that it would be 'negative' that 'the income from the child's labour would not be available to the child and his/her family'.

17 V. Muntarbhorn, 'Child rights and social clauses: Child labour elimination as a social cause?', (1998) 6 *The International Journal of Children's Rights*, no. 3, p. 275.

narrative that free trade inevitably leads to economic and social development does not withstand closer scrutiny. Proponents of a linkage between market access and child labour argue in this regard that economic growth explains little about its distribution.¹⁸ The outcome would not necessarily translate into benefits for the poor.¹⁹ The benefits that economic globalisation brings are highly diffuse. In many instances, the holders of power in economically developed states support the ruling elites and middle class in developing and emerging states through trade liberalising decisions.²⁰ This argument is, indeed, supported by empirical data, which indicate that the poorest people on Earth do not live in the poorest states.²¹ In addition, it should be acknowledged that poverty is not only a cause but also a consequence of child labour. Working from a young age can have a detrimental impact on the overall development of the child.²² The time and physical and mental demands that working requires cannot be invested in education.²³ Many children work as cheap labour in states where adult unemployment is high. Extremely low legal compliance standards are said to drive people in similarly low-skilled jobs in other developing and emerging states out of their jobs as unconscionable competition plays out.²⁴

Against the background of this heated debate, most developing and emerging economies were strong opponents of a linkage between trade and the protection of human rights in the 1996 WTO's Singapore round.²⁵ They refused to legitimise the WTO as the dedicated forum to deal with human rights, including labour standards. The outcome document of the Singapore round indicates that the ILO is the relevant international forum to deal with labour standards.²⁶ This declaration also explains that the WTO and the ILO should align their work.²⁷ However, in reality they do not collaborate to a great extent.²⁸ International trade law and labour standards are the subject of distinct legal systems.

To date, the ILO has issued two major declarations that explicitly consider the link between trade and labour. These are the 1998 Declaration on Fundamental Principles and Rights at Work and its follow-up, the 2008 Declaration on Social Justice for a Fair Globalization.²⁹ In apparent consideration of the Singapore consensus, these declarations stress that core labour standards should not be used for protectionist trade purposes and that the comparative advantage of any state should in no way be called into question.³⁰ At the same time, they commit ILO Member States to respect and enforce four 'core labour' standards, including the effective abolition of child labour.³¹ ILO Member States are said to be bound to ensure that child labour

18 Z. Bauman, *Globalization: The Human Consequences* (1998), p. 18; A. Prakash & J. Hart, 'Globalization and Governance: An Introduction', in A. Prakash & J. Hart (eds.), *Globalization and Governance* (2004), p. 15.

19 S. Joseph, 'Trade to Live or Live to Trade: The World Trade Organization, Development and Poverty', in M. Baderin & R. McCorquodale (eds.), *Economic, Social and Cultural Rights in Action* (2007), p. 403; S. Fredman, *Human Rights Transformed: Positive Rights and Positive Duties* (2009), p. 44.

20 Th. Pogge, *World Poverty and Human Rights* (2002), p. 142; J.T. Gathii, 'TWAAIL: A Brief History of Its Origins, Its Decentralized Network, and a Tentative Bibliography', (2011) 3 *Trade Law and Development*, no. 1, pp. 34 and 39.

21 L. Beer & T. Boswell, 'The Resilience of Dependency Effects in Explaining Income Inequality in The Global Economy: a Cross-National Analysis', (2002) VIII *Journal of World-Systems Research*, no. 1, p. 49. See A. Sumner, 'Where do the World's Poor Live? A New Update', (2012) *Institute of Development Studies*, no. 393, <<http://www.ids.ac.uk/publication/where-do-the-world-s-poor-live-a-new-update>> (last visited 18 January 2018), pp. 8-11, 21.

22 CRC/C/GC/16, supra note 5, para. 4; S. Sahin & A. Nath Ghosh, 'Effect of Ban on Exports Containing Child Labour in a Dynamic Model in Presence of Imperfect Monitoring', (2016) 51 *Foreign Trade Review*, no. 1, p. 26.

23 L. Swepston, *A Commentary on the United Nations Convention on the Rights of the Child, Article 32* (2012), paras. 66, 87 and 90.

24 J.M. Baland & J. Robinson, 'Is Child Labour Inefficient?', (2000) 108 *Journal of Political Economy*, no. 4, p. 667; D. Brown, 'International Trade and Core Labour Standards: A Survey of the Recent Literature', (2000) *OECD Labour Market and Social Policy—Occasional Paper*, no. 43, <http://www.oecd-ilibrary.org/social-issues-migration-health/international-trade-and-core-labour-standards_677200103808> (last visited 3 November 2016), para. 264; R. Howse, 'The World Trade Organization and the Protection of Workers' Rights', (1999) 131 *Journal of Small and Emerging Business Law*, pp. 2-3; A. Chan & R. Ross, 'Racing to the Bottom: International Trade Without a Social Clause', (2003) 24 *Third World Quarterly*, no. 6, p. 1011.

25 Aaronson, supra note 10, p. 28.

26 WTO, Singapore Ministerial Declaration, WT/MIN(96)/DEC/W (1996), para. 4.

27 Ibid.

28 Ph. Alston, 'Facing Up the Complexities of the ILO's Core Labour Standards Agenda', (2005) 16 *European Journal of International Law*, no. 3, p. 480; Ch. Kaufmann & L. Meyer, 'Trade and Human Rights', (2007) *Human Rights and International Legal Discourse*, no. 1, p. 61.

29 ILO, Declaration on Fundamental Principles and Rights at Work (86th Conference Session Geneva) (1998); ILO, Declaration on Social Justice for a Fair Globalization (97th Conference Session Geneva) (2008).

30 ILO, Declaration on Fundamental Principles and Rights at Work, *ibid.*, para. 5; ILO, Declaration on Social Justice for a Fair Globalization, *ibid.*, p. 11.

31 ILO, Declaration on Fundamental Principles and Rights at Work, *ibid.*, para 2; ILO, Declaration on Social Justice for a Fair Globalization, *ibid.*, pp. 6-7. The other core labour standards are freedom of association and the effective recognition of the right to collective bargaining; the elimination of all forms of forced or compulsory labour; and the elimination of discrimination in respect of employment and occupation.

is ruled out regardless of whether or not they have ratified the relevant ILO Conventions. The abolishment of child labour would be morally salient, not politically arbitrary, and therefore universally applicable.³²

The declaration on the abolishment of child labour as a core labour standard has been the subject of much controversy. Many developing and emerging states have been unwilling to sign ILO Convention 138 (1973) which aims to abolish child labour and raise the minimum age for admission to employment or work to a level consistent with the fullest physical and mental development of young persons.³³ It was only in 2000 – after the 1998 Declaration on Fundamental Principles and Rights at Work was adopted – that another more limited Convention had been presented because the pace of ratification of ILO Convention 138 was so slow. ILO Convention 182 requires states to take immediate and effective measures to secure the prohibition and elimination of the worst forms of child labour.³⁴

The debate on the linkage between trade and human rights does not yet appear to be settled. It recently re-emerged during a discussion of the 2016 ILO Resolution concerning Decent Work in Global Supply Chains.³⁵ Part of this focused on whether ILO Member States should commit to a reference to labour standards, including core labour standards, in trade and investment agreements.³⁶ The official record indicates that a number of hegemonic Member States – India, China, Brazil, joined by the United Arab Emirates – were vocal in opposing a reference to a social clause in this Resolution.³⁷ The Netherlands – speaking on behalf of the EU and its Member States – and other economically developed states such as Norway and New Zealand, supported a reference to labour standards in the discussed Resolution. One remarkable development since the Singapore Round is that so-called ‘counter-hegemonic’ Member States of the Global South were generally supportive of a reference to labour standards. Amongst others, Member States from the African Group and the Latin American and Caribbean Group expressed their support.³⁸ Other official documents seem to confirm that there is currently no rigid North-South divide regarding trade restrictions on products of child labour. The European Commission positions itself, for example, as a strong opponent of such restrictions in a 2013 Staff Working Document,³⁹ while the European Parliament has repeatedly stated its commitment to consider import restrictions for products made using child labour.⁴⁰

On balance, it appears that import restrictions can be a means to create a level playing field for human rights protection. It is important to note here that two conditions concerning the design of import restrictive measures should be fulfilled. Both conditions stem from the concept of ‘international cooperation’, which occupies a central place in the Convention on the Rights of the Child. Article 4 of this Convention stresses that State Parties shall ‘undertake all appropriate legislative, administrative and other measures with regard to economic, social and cultural rights within the framework of international cooperation’.⁴¹ First, it cannot be overstated that import restrictions can only serve as a mechanism of last resort. Import restrictions (and accompanying measures) to prevent that goods that result from child labour enter the market of the extraterritorial state can only be imposed if (and sustained as long as) more cooperative measures are not

32 See B. Langille, ‘Core Labour Rights – The True Story (Reply to Alston)’, (2005) 16 *European Journal of International Law*, pp. 411 and 430.

33 1973 ILO Convention C138: Minimum Age Convention (Convention concerning Minimum Age for Admission to Employment) (58th Conference Session Geneva 1973), 1015 United Nations Treaty Series, p. 297.

34 ILO Convention C182, *supra* note 1.

35 ILO, Resolution concerning Decent Work in Global Supply Chains (105th Conference Session Geneva), UN Doc. ILC.105/Resolutiontest data (2016).

36 ILO, Fourth Item on the Agenda: Decent Work in Global Supply Chains. Reports of the Committee on Decent Work in Global Supply Chains: Summary of Proceedings (105th Conference Session Geneva), UN Doc. ILC.105/PR/14-2(Rev.)/1.1 (2016).

37 ILC.105/PR/14-2(Rev.)/1.1, *ibid.*, paras. 430-431, 437, 451 and 458-461.

38 ILC.105/PR/14-2(Rev.)/1.1, *ibid.*, paras. 428, 440, 441 and 457. Guatemala is an exception. This country joined Brazil, India and China. ILC.105/PR/14-2(Rev.)/1.1, *ibid.*, paras. 437 and 458.

39 SWD(2013) 173 final, *supra* note 15, pp. 4-11.

40 See e.g. European Parliament Resolution No. 2015/2038(INI) of 5 July 2016 on implementation of the 2010 recommendations of Parliament on social and environmental standards, human rights and corporate responsibility, [2016] P8_TA(2016)0298, para. 12.

41 Art. 4 1989 Convention on the Rights of the Child, 1577 United Nations Treaty Series, p. 3. See also Art. 8 ILO Convention C182, *supra* note 1. This Article stresses that Members shall take appropriate steps to assist one another in giving effect to the provisions of this convention through enhanced international cooperation and/or assistance. It emphasises that international cooperation includes support for social and economic development, poverty eradication programmes and universal education.

feasible.⁴² Second, any import restrictions should be accompanied by a proposal relating to the appropriate accompanying measures to be taken. Why would this be the case? The empirical evidence regarding the correlation between child labour and export sectors is too inconclusive to assert that bans on products that are produced by child labour alone would protect the rights of children who may be beyond their territorial borders. Import restrictions without appropriate accompanying measures can have various undesirable effects. They can, for example, reinforce the power of oppressive elites.⁴³ Or, children who are no longer permitted to take employment might move to the shadow economy or to sectors that are not involved in exports.⁴⁴ It is proven that it is possible to design such measures. Economics scholars have demonstrated that import sanctions can be effective if they are accompanied by appropriate additional measures such as educational subsidies and incentives for parents to have small families.⁴⁵

3. WTO regime through the lens of the attitude-behaviour gap

The ILO is considered to be the dedicated international forum to strengthen labour rights. However, it is currently not sufficiently equipped to advance human rights protection, such as the abolition of child labour. Part of its perceived failure is due to the strength of the WTO regime. State Parties to the GATT have to deal with the WTO regime when they aim to improve corporate accountability through imposing import restrictions on products of child labour. It has been suggested that the discussion on a social clause can be avoided under the WTO regime. In particular, State Parties that aim to impose trade restrictive measures could rely upon perceptions that the importing market has regarding products produced by child labour under Article III(4) GATT and Article XX(a) GATT. While valuable, such analyses have largely overseen the role of the attitude-behaviour gap. This gap indicates that there is an inconsistency between what people value or believe and what they actually do. Behavioural economists have extensively studied the barriers which cause and influence this gap.⁴⁶ There is a risk that legal nuances are overly simplified if behavioural insights are not included in the analysis of import restrictions under the WTO regime.⁴⁷ Drawing from behavioural insights can help bring greater accuracy and improve the understanding as to whether and to which extent import restrictions would be allowed under the WTO regime.⁴⁸ Articles III(4) and XX(a) GATT are discussed in turn.

3.1 Article III(4) GATT

The WTO DSM used to interpret the mutually agreed upon basic principles of the GATT, which are the Most Favoured Nation Principle (Article I(1) GATT) and the National Treatment Principle (Article III(4) GATT), in an extensive manner while interpreting the exceptions in Article XX GATT – which can serve as grounds to allow trade sanctions for non-trade public values – in an extremely restrictive way.⁴⁹ The WTO's Most Favoured Nation Principle prescribes in essence that a State Party cannot discriminate between other State Parties. This means that a State Party which treats the goods of one State Party in a particular way has to grant the same treatment to the goods of all other State Parties. The National Treatment Principle

42 E.g. M. Mitro, 'Outlawing the Trade in Child Labor Products: Why the GATT Article XX Health Exception Authorizes Unilateral Sanctions', (2002) 51 *American University Law Review*, no. 6, pp. 1226-1228; E. Duruigbo, 'Corporate Accountability and Liability for International Human Rights Abuses: Recent Changes and Recurring Challenges', (2008) 6 *Northwestern Journal of International Human Rights*, no. 2, p. 225; F. Villanueva, 'Le Champs d'Application de l'Article XX(a) du GATT', (2012) 58 *Revue de Droit de McGill*, no. 2, p. 430.

43 See UN Committee on Economic, Social and Cultural Rights, General Comment 8 on the Relationship between Economic Sanctions and Respect for Economic, Social and Cultural Rights, UN Doc. E/1997/8 (1997), para. 4; UN Committee on Economic, Social and Cultural Rights, Concluding Observations: Israel, UN Doc. E/C.12/1/Add.27 (1998), para. 39.

44 E.g. D. Samida, 'Protecting the Innocent or Protecting Special Interests? Child Labor, Globalization and the WTO', (2005) 34 *Denver Journal of International Law and Policy*, pp. 421-422.

45 E.g. K. Basu & V.H. Pham, 'The Economics of Child Labour', (1998) 88 *The American Economic Review*, no. 3, p. 425; M. Hazan & B. Berdugo, 'Child Labour, Fertility and Economic Growth', (2002) 112 *Economic Journal*, no. 482, p. 825; M. Doepke & F. Zilibotti, 'The Macroeconomics of Child Labour Regulation', (2005) 95 *American Economic Review*, no. 5, p. 1515; K. Kis-Katos, 'Does Globalization Reduce Child Labor?', (2007) 16 *Journal of International Trade & Economic Development*, no. 1, p. 71.

46 K. Peattie, 'Sustainability Marketing', in L.A. Reisch & J. Thøgersen, *Handbook of Research on Sustainable Consumption* (2015), p. 107. An overview of behavioural studies documenting this gap can be found in R. Caruana et al., 'Beyond the Attitude-Behaviour Gap: Novel Perspectives in Consumer Ethics: Introduction to the Thematic Symposium', (2015) 136 *Journal of Business Ethics*, no. 2, p. 215.

47 Cf. A. van Aaken, 'Behavioral International Law and Economics', (2014) 55 *Harvard International Law Journal*, no. 2, p. 480.

48 Cf. T. Boudier, 'Behavioral International Law', (2015) 163 *University of Pennsylvania Law Review*, p. 1112.

49 S. Joseph, *Blame It on the WTO? A Human Rights Critique* (2013), pp. 117-120.

prohibits discrimination by a State Party between similar domestic and imported products in a way that treats imported products less favourably. This principle obliges a State Party to the GATT to treat the goods of other State Parties the same as its own 'like' goods.

In apparent consideration of the described debate on a social clause, it has been suggested that products that are made by child labour might not be 'like' products that are not made by such labour under Article III(4) GATT because they do not satisfy consumers' same wants and demands about the way in which the product is produced.⁵⁰ This suggestion relies on the criterion of 'the extent to which consumers perceive and treat the products as alternative means of performing a particular want or demand' which can be used to determine if a product is a 'like' product in the sense of Article III(4) GATT.⁵¹ This criterion was included in a list of non-limitative criteria described in the *Asbestos* case (2001) which can be employed to determine whether a product is a 'like' product in the sense of Article III(4) GATT.⁵²

If products made by children and products not made by children were indeed not considered to be 'like' products, then the implication would be that the importing State Party might treat them differently under the GATT regime.⁵³ This would mean that import restrictions (and accompanying measures) on products of child labour would be considered as being consistent with Article III(4) GATT.

However, the insights from behavioural economics indicate that it is more likely that products from child labour would be considered as being 'like' products that are not made by children under the GATT regime. The WTO DSM's assessment of the 'likeness' of products under Article III(4) GATT limits itself to an assessment of consumer preferences and does not take into account the broader preferences of citizens concerning child labour. The implication is that import restrictions (and accompanying measures) on products from child labour would be considered inconsistent with Article III(4) GATT. This argument needs to be broken down into two parts in order to better understand it.

The first part of this argument considers that 'particular wants or demands' which people might have regarding child labour are generally not reflected in their consumption behaviour. People generally treat products that are made by children 'like' products that are not made by children *while they are performing the act of consumption*, regardless of whether they might have any wants and demands about the way in which the product is produced.

Although some people urge companies to change, they themselves do not always take human rights into account as much as they might intend to. The route from attitudes to actual consumption behaviour is flexible. A person who has ethical concerns regarding child labour might still buy a shirt made by child labour if they have spilt coffee on their shirt on their way to work. Or, a person who has ethical concerns regarding child labour might still consume chocolate made by child labour because they are not aware that child labour exists in the chocolate industry. Therefore, despite their ethical concerns, these people treat products made by child labour as alternatives to products that are not made by child labour when they are performing the act of consumption.

Such behaviour can be explained by the behavioural phenomenon of people's actions not correlating with their attitudes.⁵⁴ This 'gap' indicates, in essence, that people do not follow all their attitudes through because many different activities and goals compete for their limited resources; people's information, finances, time, energy, knowledge and cognitive capacities are only available in limited quantities. People behave flexibly, according to the context.

Sunstein and Thaler popularised the attitude-behaviour gap in legal and policy studies.⁵⁵ Similarly, Van Aaken and Broude have recommended that insights from behavioural economic analysis should be

50 Cf. O. De Schutter, *Trade in Service of Sustainable Development: Linking Trade to Labour Rights and Environmental Standards* (2015), pp. 50-51. De Schutter presents a general analysis 'Do consumers' preferences matter?' which focuses not exclusively on child labour.

51 De Schutter, *ibid.*, pp. 50-51 referring to *Asbestos* Appellate Body, *supra* note 9, para. 102.

52 *Asbestos* Appellate Body, *ibid.*, paras. 101-103 and 113-117.

53 Cf. De Schutter, *supra* note 50, pp. 50-51.

54 Peattie, *supra* note 46, p. 107; Caruana et al., *supra* note 46, p. 215.

55 E.g. Ch. Jolls et al., 'A Behavioural Approach to Law and Economics', (1998) 50 *Stanford Law Review*, pp. 1471-1550; C. Sunstein & R. Thaler, *Nudge* (2008). See, for example, B. Cooreman, *Global Environmental Protection through Trade* (2017), p. 35 referring to C. Sunstein, 'Endogenous Preferences, Environmental Law', (1993) 22 *Journal of Legal Studies*, no. 2, pp. 217 and 242.

applied in international law.⁵⁶ These authors relied on studies conducted by the psychologists Kahneman and Tversky in the 1970s.⁵⁷ Kahneman and Tversky listed systematic heuristics and biases that influence how people form intuitive beliefs and choices on the basis of incomplete and imperfect information. They relied, in turn, on Simon's theory of 'bounded rationality' for which he received the 1978 Nobel Prize in economics.⁵⁸ Simon became famous for substituting the concept of the rational 'economic man' in classic organisational theory with a choosing 'human' organism of limited capabilities.⁵⁹

In terms of the second part of the argument, it can be noted that the criterion used in the *Asbestos* case – which was cited above – does not take the attitude-behaviour gap into account. This criterion refers to the limited concept of consumer perceptions and behaviour, as opposed to the broader concept of people's (or citizens') perceptions and behaviour.

The reference to consumer preferences to assess 'likeness' under Article III(4) GATT has been carefully chosen by the WTO DSM. The WTO DSM had indicated in the *Japan – Alcoholic Beverages II* case that it has a considerable margin of appreciation in interpreting 'likeness'.⁶⁰ It used the metaphor of an accordion 'which stretches and squeezes in different places' to describe how it interprets the concept of 'likeness' in the different provisions of the GATT.⁶¹ In the *Asbestos* case, the Appellate Body stressed that health risks that could influence consumer preferences in the importing State Party could contribute to a competitive relationship between the products at issue in the market. The Appellate Body considered that *any* criterion employed to assess 'likeness' in the sense of Article III(4) GATT should be exclusively concerned with competitive relationships in the marketplace.⁶²

The current interpretation of 'likeness' to assess Article III(4) GATT can be considered as restrictive. The WTO DSM has relied on people's behaviour – which is inevitably inconsequential – not to respect their attitudes in its interpretation of the National Treatment Principle. This interpretation reduces people to consumers. Arguably, the chosen interpretation also goes further than the customary principles of the interpretation of international law, which are reflected in Article 3.2. Dispute Settlement Understanding.⁶³ This Article also indicates that the WTO DSM cannot add to or diminish the rights and obligations in the covered agreements. It would be desirable for the WTO DSM to consider the attitude-behaviour gap in its future interpretation of 'likeness' in the sense of Article III(4) GATT.

3.2 Article XX(a) GATT

3.2.1 Interpretation

If import restrictions on products of child labour can be considered inconsistent with the National Treatment Principle, then the question arises whether such restrictions can be justified under the exceptions in Article XX GATT. In the 1998 *Shrimp* case, the Appellate Body argued that requirements put in place by importing State Parties are not a priori incapable of justification under Article XX.⁶⁴ Over time, the WTO DSM has given more consideration to non-trade public value considerations that are embedded in Article XX GATT.

The academic literature has identified the following paragraphs as being relevant to protect human rights, including labour standards: necessary to protect public morals (Article XX(a) GATT); necessary to protect human life or health (Article XX(b) GATT); and relating to the conservation of exhaustible natural resources

56 Van Aaken, *supra* note 47, p. 480; Boudier, *supra* note 48, p. 1112.

57 See D. Kahneman, 'Maps of Bounded Rationality: Psychology for Behavioral Economics', (2003) 93 *The American Economic Review*, no. 5, p. 1149.

58 H. Simon, *Administrative Behavior: a Study of Decision-Making Processes in Administrative Organization* (1947); H. Simon, 'A Behavioral Model of Rational Choice', (1955) 64 *Quarterly Journal of Economics*, pp. 99-118.

59 Simon (1955), *ibid.*, p. 114.

60 I. Van Damme, 'Treaty Interpretation by the WTO Appellate Body', (2010) 21 *European Journal of International Law*, no. 3, p. 622 referring to WTO, *Japan – Taxes on Alcoholic Beverages Report of the Appellate Body* (12 March 2001), WT/DS8/AB/R, WT/DS10/AB/R and WT/DS11/AB/R, p. 23.

61 *Alcoholic Beverages* Appellate Body, *ibid.*, p. 23.

62 *Asbestos* Appellate Body, *supra* note 9, para. 117.

63 1994 Understanding on Rules and Procedures Governing the Settlement of Disputes 33 *International Legal Materials*, 1226, Art. 3.2. These Principles can be found in the 1969 Vienna Convention on the Law of Treaties (GATT), 1155 United Nations Treaty Series 331, Art. 31-33.

64 WTO, *US: Import Prohibition of Certain shrimp and Shrimp products - Report of the Appellate Body* (12 October 1998), WT/DS58/AB/R, para. 121.

(Article XX(g) GATT). It has mainly focused on the case law relating to Article XX(b) and Article XX(g) GATT. A broad interpretation of Article XX(b) GATT might permit measures that protect rights which concern physical and mental health and security.⁶⁵ Article XX(g) GATT might be useful to protect the right to an adequate standard of human health as well as the rights to food and water.⁶⁶ This scholarly focus can be explained by the fact that there used to be no substantive case law under Article XX(a) GATT.⁶⁷ In the *China Entertainment* case, the WTO DSM explained that this Article protects ‘the standards of right and wrong conduct maintained by or on behalf of a community or nation’ under the GATT.⁶⁸ A substantive interpretation had, however, been effectively outmanoeuvred by the WTO DSM employing the necessity condition which is part of Article XX(a) GATT. It has been discussed extensively by others that the WTO DSM seems to be somewhat arbitrary in the appreciation of the necessity of an import restriction to reach the desired end.⁶⁹ According to the necessity condition, a measure must be ‘necessary’ to protect public morals. This condition relates to the need for a means to protect public morals. The WTO DSM determines whether an alternative measure – which is less trade restrictive – could have been reasonably employed by the imposing party to achieve the desired objective by a holistic ‘weighting and balancing’ test.⁷⁰ This test assesses a series of factors, including the importance of the objective, the contribution of the measure to that objective and the trade-restrictiveness of the measure.

The Office of the UN High Commissioner for Human Rights (OHCHR) suggested in its 2005 analysis on Human Rights and World Trade Agreements that Article XX(a) GATT might be of greater relevance than had been considered at the time.⁷¹ The OHCHR relied mainly on a textual analysis to argue that the very idea of public morality has become inseparable from human rights and to express that the full range of codified human rights could fall within the ambit of Article XX(a) GATT.⁷²

The OHCHR interpreted that measures to implement State Parties’ obligations to protect the public morals of their own populations could fall within the compass of Article XX(a) GATT. Similar to the discussion which was set out above, the OHCHR described that State Parties can rely upon the perceptions that people in the importing market have regarding products produced by child labour.⁷³ Under this exception, inward measures aiming to protect the public morals of the population of the importing State Party were, thus, proposed to be easier to justify than measures that protect people who directly suffer human rights abuses in exporting State Parties.

Morals vary in time and space, depending on the prevailing social, cultural, ethical and religious values.⁷⁴ It appears that this interpretation leaves the scope of what constitutes a ‘public moral’ to the discretion of individual GATT State Parties.⁷⁵ Indeed, according to the Appellate Body, State Parties should be given some scope to define and apply public morals for themselves in their respective territories according to their own systems and scales of values.⁷⁶ This approach accounts for the fact that morals are to a large extent embedded in the legal culture of a nation.

65 E.g. Joseph, *supra* note 49, p. 110.

66 E.g. D. Disierto, *Public Policy in International Economic Law: the ICESCR in Trade, Finance* (2015), p. 202.

67 F.J. Garcia & S. Jun, ‘Trade-Based Strategies for Combatting Child Labour’, in B. Weston (ed.), *Child Labor and Human Rights: Making Children Matter* (2006), p. 20.

68 E.g. Joseph, *supra* note 49, p. 117.

69 E.g. *ibid.*, pp. 111–114.

70 WTO, *China: Measures affecting Trading Rights and Distribution Services for Certain Publication and Audiovisual Entertainment Products* (14 March 1997), WT/DS31/AB/R and AB-1997-2 interpreting WTO, *US: Measures Affecting the Cross-border Supply of Gambling and Betting Services – Report of the Panel* (10 November 2004), WT/DS285/R, para. 6.465.

71 OHCHR, *Human Rights and World Trade Agreements. Using General Exception Clauses to Protect Human Rights*, UN Doc. HR/PUB/05/5 (2005), pp. 6–12. See also S. Charnovitz, ‘Exploring the Environmental Exceptions in GATT Article XX’, (1991) 25 *Journal of World Trade*, no. 5, p. 338.

72 HR/PUB/05/5, *ibid.*, p. 5.

73 L. Ankersmit et al., ‘Diverging EU and WTO Perspectives on Extraterritorial Process Regulation’, (2012) *Melbourne Journal of International Law Online*, p. 49.

74 WTO, *US: Measures Affecting the Cross-border Supply of Gambling and Betting Services – Report of the Appellate Body* (7 April 2005), WT/DS285/AB/R, paras. 6.461 and 6.465–6.468.

75 P. Lamy, ‘Towards Global Governance?’ (21 October 2005), Master of Public Affairs inaugural lecture at the Institut d’Etudes Politiques de Paris, <https://www.wto.org/english/news_e/sppl_e/sppl12_e.htm> (last visited 16 April 2018).

76 *Gambling Appellate Body*, *supra* note 74, paras. 6.461 and 6.465–6.468.

The Appellate Body seems to have followed the same reasoning as the OHCHR when it adopted the *Seal* report, its first substantial interpretation of Article XX(a) GATT, in 2014.⁷⁷ In this report, the Appellate Body considered EU regulatory measures that prohibited the placing of seal products on the market in the territories of the EU Member States as inward measures.⁷⁸ These measures aimed to protect EU citizens and consumers (and not seals).⁷⁹ By overturning a part of the Panel's decision, the Appellate Body explicitly left unanswered the question about whether purely 'outward measures', which protect the methods of products and processes, would be allowed under Article XX(a) GATT.⁸⁰

Closely related to this is the observation that the WTO did not elaborate in depth on the issue of extraterritoriality. The Appellate Body held that the disputed Regulation did not impose extraterritorial obligations as it was designed to address seal hunting activities 'within and out the Community' and the seal welfare concerns of European citizens.⁸¹ The Appellate Body refrained from commenting further on the issue of extraterritoriality because the complaining and interfering parties had not questioned it.

The WTO DSM's pronouncements in the *Seal* case can be used to assess to what extent import restrictions (and accompanying measures) on products of child labour would be allowed under Article XX(a) GATT. This could be done insofar as such import restrictions would be considered as inward measures that are admissible under the necessity condition. The WTO DSM would apply its 'weighting and balancing' test – which was described above – to determine whether any reasonably available alternatives to unilateral import restrictions appeared to be sufficiently effective to protect public morals. It might, among other things, take into consideration which forms of child labour are covered by import restrictions (and accompanying measures). The Panel might also consider that alternative measures were not reasonably available without international cooperation.

The Appellate Body confirmed a two-step test which was introduced by the Panel to determine whether import restrictions can be successfully defended under the morals exception in Article XX (a) GATT in the *Seal* case.⁸² Evidence of public concerns is taken into account as a whole in both steps.⁸³ The Panel considered all evidence placed before it in establishing that a policy objective is within the scope of the exception. This includes the texts of statutes, legislative history and other evidence regarding the structure and operation of the measure at issue.

The first step consists of determining whether the public concerns in question truly exist in the importing State Party's society. In this particular case, the existence of EU citizens' public concerns regarding 'the incidence of inhumane killing of seals' and 'their individual and collective participation as consumers in, and exposure to the economic activity which sustains the market for seal products derived from inhumane hunts' was assessed. Amongst others, the Panel reviewed the European Commission's proposal

77 *Seal* Panel, supra note 9; *Seal* Appellate Body, supra note 9.

78 European Parliament and Council Regulation No. 1007/2009 of 16 September 2009 on Trade in Seal Products, OJ L 286, 31.10.2009, p. 36; European Commission Regulation No. 737/2010 of 10 August 2010 Laying Down Detailed Rules for the Implementation of Regulation 1007/2009 of the European Parliament and of the Council on Trade in Seal Products, OJ L 216, 17.8.2010, p. 1.

79 The EU Regulation had been adopted in response to concerns by citizens and consumers about the welfare of seals anywhere in the world and about exposure to economic activity, which sustains the market for seal products obtained from animals killed and skinned in a way that causes pain, distress fear and other forms of suffering. (Regulation No. 1007/2009, *ibid.*, paras. 5-6.)

80 *Seal* Appellate Body, supra note 9, paras. 5.60 and 5.64. Outward measures would fall under Art. 2.2 1994 Technical Barriers to Trade Agreement, 1868 United Nations Treaty Series, p. 120. See *Seal* Appellate Body, *ibid.* para. 5.133; Kaufmann & Meyer, supra note 28, pp. 78-79; R. Howse et al., 'Sealing the Deal: The WTO's Appellate Body Report in EC – Seal Products', (2014) 18 *American Society of International Law Insights*, no. 2, <<https://www.asil.org/insights/volume/18/issue/12/sealing-deal-wto%E2%80%99s-appellate-body-report-ec-%E2%80%93-seal-products>> (last visited 15 October 2016).

81 *Seal* Appellate Body, *ibid.*, para. 5.173. See J. Scott, 'Extraterritoriality and Territorial Extension in EU Law', (2013) 62 *The American Journal of Comparative Law*, pp. 87-126 for a discussion of the EU's approach. Relevant references regarding extraterritorial obligations are mentioned in note 5, supra.

82 *Seal* Panel, supra note 9, paras. 7.32 and 7.383; *Seal* Appellate Body, supra note 9, para 5.135 and 5.167. This two-step test was introduced by the Panel in the context under Art. 2.2 1994 Technical Barriers to Trade Agreement, 1868 United Nations Treaty Series, p. 120. The Panel also relied on this assessment in its analysis under Article XX(a) GATT. The Appellate Body considered the two-step test only in the context of Article XX(a) GATT.

83 *Seal* Panel, *ibid.*, para. 7.383; *Seal* Appellate Body, *ibid.*, para. 5.144.

for Regulation 1007/2009 and its accompanying impact assessment.⁸⁴ Particular attention was paid to the reference in the Commission's proposal to a 'massive number of letters and petitions on the issue expressing citizens' deep indignation and repulsion regarding the trade in seal products in such conditions'.⁸⁵ A Recommendation of the Parliamentary Assembly of the Council of Europe was also taken into account.⁸⁶ Although the concerns about seal welfare were found not to be univocal, the Panel considered that 'a majority of comments and statements documented' in these exhibits show overall support for the measure in light of the wishes of EU citizens to ban seal products from the EU market based on their concerns on seal welfare.⁸⁷

If public concerns are deemed to exist, then the second step consists of determining whether a connection exists between such concerns and the scope of 'public morals' as 'defined and applied' by a regulating member in its territory according to its own systems and values. In this particular case, the Panel tested whether the described public concerns were indeed a moral issue within the EU as a community. The various actions taken by the EU as well as its Member States concerning animal protection in general were assessed. The Lisbon Treaty as well as EU rules regarding animal protection were considered.⁸⁸

The two-step test would be applied as follows to import restrictions on the products of child labour. In the first step, it would be determined whether public concerns regarding child labour truly existed in the importing State Party's society. Letters by citizens might, amongst others, be taken into account.⁸⁹ It is not necessary for the evidence to be univocal.⁹⁰ It would be sufficient if a majority of the evidence indicated that such concerns existed. In the second step, the Panel would determine whether a connection existed between such concerns and the scope of 'public morals' as 'defined and applied' by a regulating member in its territory, according to its own systems and values. The Panel might resort to national legislation in the importing State Party which prohibits child labour.

3.2.2 Attitude-behaviour gap

The WTO DSM has taken the attitude-behaviour gap into account to a certain extent in its assessment of Article XX(a) GATT in the *Seal* case. It referred to concerns of 'citizens' individual and collective participation as consumers in, and exposure to the economic activity' to interpret this Article. It was indicated above that citizen concerns are broader than consumer concerns. Indeed, the employed standard takes into account certain attitudes that are not translated into actual consumption behaviour.

The reason for this interpretation seems to be, of course, that the exception in Article XX(a) GATT is not concerned with competition in consumption. Rather, it is concerned with assessing whether a State Party has a sufficient basis for 'adopting and enforcing' a WTO-inconsistent measure to protect the standards of rights and wrong conduct maintained by or on behalf of a community or nation.⁹¹

Yet, it is argued here that the WTO DSM's interpretation of the public morals exception does not embody sufficient guarantees against arbitrariness. A range of issues, which relate to the standards of rights and wrong but are mitigated by some of the barriers that create the attitude-behaviour gap are not taken into account. Specifically, it concerns those issues that are impacted by information asymmetries and information manipulation.⁹² Amongst others, issues that are not subject to deliberate judgements of citizens, issues that are not raised in public and issues that are misunderstood cannot be assessed under the WTO DSM's interpretation of Article XX(a) GATT that was proposed in the *Seal* case.

84 *Seal Panel*, *ibid.*, paras. 7.23-7.25 and 7.394-7.395 referring to European Commission, Staff Working Document Accompanying Document to the Proposal for a Regulation of the European Parliament and of the Council Concerning Trade in Seal Products – Impact Assessment on the Potential Impact of a Ban of Products Derived from Seal Species, COM(2008) 469 final (Panel Exhibit JE-16) (2008), Explanatory Memorandum, p. 2; *Seal Appellate Body*, *ibid.*, para. 5.153.

85 *Seal Panel*, *ibid.*, para. 7.24.

86 *Seal Panel*, *ibid.*, para. 7.25.

87 *Seal Panel*, *ibid.*, para. 7.26.

88 *Seal Panel*, *ibid.*, para. 7.34 referring to the Treaty of Lisbon amending the Treaty on European Union and the Treaty Establishing the European Community, OJ C 306, 17.12.2007.

89 Cf. *Seal Panel*, *ibid.*, para. 7.395.

90 Cf. *Seal Panel*, *ibid.*, para. 7.397.

91 Cf. *Asbestos Appellate Body*, *supra* note 9, para. 115.

92 Cf. S. Deva, *Regulating Corporate Human Rights Violations: Humanizing Business* (2012), p. 142.

Citizens are not always capable of having access to sufficient resources to inform themselves about the economics of child labour. For example, they might only have been informed by reports in the media and multinational corporations which have made the case for trade extremism. Such reports argue that cutting off market access has to be avoided at all costs (even if products of the worst forms of child labour are targeted).⁹³ Such reports often refer to the conditions that relate to the design of import restrictive measures in the framework of international cooperation – which were set out in the second section of this essay – as arguments not to impose import restrictions at all.

It is worth indicating here that a similar argument can be made in relation to other core labour standards (which are not the subject of this article). Take, for example, the freedom of association. The UN Working Group on Business and Human Rights indicated that union repression has a substantial impact on workers' capabilities to defend their rights in the Republic of Korea, including the right to a healthy workplace in which they are protected against hazardous chemical substances.⁹⁴ Proponents of a social clause could argue that this core labour standard might require additional actions in importing countries, including trade restrictive measures to increase corporate accountability. It seems, however, to be extremely challenging to impose import restrictive measures in relation to the freedom of association that are permitted under the WTO DSM's interpretation of Article XX(a) GATT. The reason for this is that the freedom of association is not likely to be the subject of deliberate judgments by citizens in various GATT State Parties.

These findings conflict with the analysis which was presented by Cooreman. This scholar assumed that the *Asbestos* standard which refers to both consumer and citizen concerns can efficiently guard against information asymmetries and information manipulation.⁹⁵ This scholar claimed that 'genuine' citizen concerns (including those affected by information asymmetries and information manipulation) could be detected if the WTO DSM relied on information from citizens and various other actors, including 'civil society organisations and public opinion firms'.⁹⁶

At least two arguments can be raised against this position. First, while it is likely that various issues that are monitored by non-profit and for-profit organisations are often similar to citizen concerns, the concerns of such organisations cannot be considered to represent citizen concerns. They are not subject to the analysis by the WTO DSM. Second, the extent to which various actors, including organisations, influence public concerns is likely to be no less impacted by issues of information asymmetries and information manipulation than the issues about which citizens are concerned. Simon himself developed the theory of 'bounded rationality' in the context of organisational structures. He rejected the assumption made in the classic organisational theory that organisations would be led by a rational all-knowing economic man, instead replacing him with a number of cooperating decision-makers whose capabilities for rational action are limited, 'both by a lack of knowledge about the total consequences of their decisions, and by personal and social ties'.⁹⁷

While NGOs and public opinion firms can often be credited with empowering and educating people about the intricacies of participatory democracy, such as the ability to question, discuss and reflect on

93 E.g. S. Butler, 'H&M factories in Myanmar Employed 14-year-old workers', *The Guardian*, 21 August 2016, <<https://www.theguardian.com/business/2016/aug/21/hm-factories-myanmar-employed-14-year-old-workers>> (last visited 16 April 2018) citing a statement of H&M which claims that the ILO 'stresses the importance of not excluding [14-18 year olds] from work in Myanmar' (sic).

94 Report of the Working Group on the issue of Human Rights and Transnational Corporations and other Business Enterprises on its Visit to the Republic of Korea, UN Doc. A/HRC/35/32/Add.1 (2017), para. 43. The Republic of Korea is an ILO member, but it has yet to ratify 1948 ILO Convention C087: Freedom of Association and Protection of the Right to Organise Convention (Convention concerning Freedom of Association and Protection of the Right to Organise), 68 United Nations Treaty Series, p. 17 and 1949 ILO Convention C98: Right to Organise and Collective Bargaining Convention (Convention concerning the Application of the Principles of the Right to Organise and to Bargain Collectively), 96 United Nations Treaty Series, p. 257.

95 Cooreman, *supra* note 55, pp. 158-159 stating 'The crucial question seems to be: should trade measures based on public morals reflect consumer preferences, voters' opinions, or a compromise of both? It is submitted that both must be taken into account when examining the evidence of a genuine public moral, especially in light of information asymmetries and information manipulation.' This author continues 'If market behaviour were to be the only indicator of genuine moral concerns, more socially protective regulation might no longer pass the evidence threshold. This is also relevant in relation to new issues or new risks on which the public has not yet had the time to form an opinion, or about which insufficient information is available.'

96 Cooreman, *ibid.*, p. 159 and B. Cooreman, 'Extraterritorial Environmental Concerns and Public Morals: Testing the Limits of Article XX(a) GATT after Seals', (2016) 5 *Journal of International Trade and Arbitration Law*, p. 519 stating 'Panels have the authority to seek information from any relevant source, which could include civil society organizations, public opinion firms, local government officials and citizens'. See also Cooreman (2016), *ibid.*, p. 519 stating 'any other risk that is merely of a moral nature would need to be based on at least some public support, which could for instance be evidenced by civil society initiatives, before a government can rely on the public morals exception'.

97 Simon (1955), *supra* note 58.

consumption choices, their agenda has also been limited. The data and concerns of NGOs have, for example, a built-in bias for branded products of multinationals from economically developed states which attract the attention of the media.⁹⁸ Products and services without a brand, that are traded between businesses or that are typically produced by corporate nationals from developing and emerging market multinationals are often not brought to the attention of citizens by NGOs, even though the involvement in the way in which these products are traded might touch upon their morals. Corporations have at times also set the agenda of NGOs and public opinion firms.⁹⁹

Taken together, it has been argued here that the two-step test, which was introduced in the *Seal* case, embodies a large degree of arbitrariness regarding the issues which touch upon public morals. This test does not allow trade restrictive measures which might touch upon the morals of the importing country but are impacted by information asymmetries and information manipulation.

The WTO DSM might correct this arbitrary approach in future case law by integrating international standards in the two-step test. It seems that the WTO DSM leaves the door ajar for such a broader interpretation. In the *Seal* case, the WTO DSM referred to 'international doctrines and measures of a similar nature in other WTO Members' in its assessment of the two-step test.¹⁰⁰ While explaining that international doctrines and measures of other WTO Member States were not necessarily relevant to identify the EU's chosen objective to protect public morals, the Appellate Body opined that such documents 'illustrate that animal welfare is a matter of ethical responsibility for human beings in general'.¹⁰¹ In relation to measures of other WTO Member States, the Appellate Body highlighted the following comment which was made by the United States as a third participant in its report: 'while the focus must be on the responding Member's system and scale of values, what Members other than the responding Member consider to be public morals can offer confirmation of a Panel's determination as to what constitutes a public moral within the system of the responding Member'.¹⁰² The WTO DSM did not, however, give any specific details as to which 'international doctrines' had been taken into account. An older case under Article XX(g) GATT, the *Shrimp* case, seems to indicate that not only formally binding treaties are relevant in this regard. In this case, the Appellate Body cited international environmental norms enshrined in declarations and a ministerial decision rather than in formally binding legislation, as a basis to justify unilateral trade measures aiming to provide extraterritorial environmental protection.¹⁰³ This finding seems to indicate that the WTO DSM might in the future refer in the same way to core labour standards, including the abolition of child labour, which are embedded in the 1998 Declaration on Fundamental Principles and Rights at Work and the 2008 follow-up Declaration.

3.2.3 Chapeau test

A final question which concerns the *chapeau* of Article XX GATT needs to be addressed. If an import ban on products of child labour would survive the necessity test and the two-step test of Article XX(a) GATT, then it must also pass the *chapeau* test. According to this test, arbitrary or unjustifiable discrimination between State Parties where the same conditions prevail and disguised restrictions on international trade are forbidden.¹⁰⁴

The chapeau test failed in the *Seal* case because the EU did not impose like sanctions on all states with a similar record. The EU had included an exception for Inuit and other indigenous communities in its *Seal* regime.¹⁰⁵ The EU had provided evidence to demonstrate that concerns to protect Inuit and other

98 See J. Zerk, 'An OHCHR Initiative to Contribute to a Fairer and More Effective System of Domestic Law Remedies, in Particular in Cases of Gross Human Rights Abuses. Analysis of Written Submissions Received in Response to the Call for Submissions by OHCHR to the Report' (2014), <<http://www.ohchr.org/Documents/Issues/Business/DomesticLawRemedies/RemedyProject1.pdf>> (last visited 16 April 2018), p. 12.

99 While Cooreman mentions at one point in her observations that 'public opinion can be manipulated both by governments but also by the corporate sector that has its own public interests', she seems to not acknowledge that civil society organisations can also 'manipulate' public concerns. (Cooreman, *supra* note 55, p. 159; Cooreman (2016), *supra* note 96, p. 519).

100 *Seal* Appellate Body, *supra* note 9, para. 7.409.

101 Cf. *Seal* Appellate Body, *ibid.*, para. 7.409.

102 *Seal* Panel, *supra* note 9, note 674 referring to US third-party submission, para. 4.

103 *Shrimp* Appellate Body, *supra* note 64, paras. 154-158.

104 WTO, *US: Standards for Reformulated and Conventional Gasoline – Report of the Appellate Body* (29 April 1996), WT/DS2/AB/R, para. 20; *Shrimp* Appellate Body, *supra* note 64, paras. 119-120.

105 Art. 2(4) European Parliament and Council Regulation No. 1007/2009, *supra* note 78.

indigenous communities should prevail over the welfare of seals in the proceedings before the WTO DSM.¹⁰⁶ This evidence consisted of documents which concerned EU citizens (i.e. a 1983 Council Directive and a 2006 Declaration of the European Parliament) and the UN Declaration on the Rights of Indigenous People.¹⁰⁷ The WTO DSM did not however consider this evidence. The Panel concluded that 'the EU public concerns on seal welfare appear to be related to seal hunts in general, not any particular type of seal hunts'.¹⁰⁸ It is particularly remarkable that the WTO DSM did not evaluate the EU documents. By not doing so, the WTO DSM actually second-guessed the moral preferences of people in the importing state. It has arbitrarily chosen not to consider the moral considerations that were brought forward by the EU concerning the protection of the traditional and cultural practices of Inuit and other indigenous communities that have been hunting seals as a way of life for centuries.¹⁰⁹

4. Conclusion

This essay has first observed that some State Parties to the GATT might consider holding corporations accountable by imposing import restrictions (and accompanying measures) to curb child labour as a last resort mechanism if more cooperative measures would not materialise. It has then sought to present a more accurate interpretation of whether regulatory tools stemming from WTO law may stand in the way of such trade restrictive measures. The lens for this interpretation was the attitude-behaviour gap.

On balance, this essay found that the WTO DSM does not take the attitude-behaviour gap sufficiently into account in its interpretation of both Article III(4) and Article XX(a) GATT. On the one hand, Article III(4) GATT only renders account of attitudes that are reflected in consumption decisions. This extensive interpretation reduces people to consumers. On the other hand, the two-step test which has been developed to assess public morals in the sense of Article XX(a) GATT embodies a degree of arbitrariness. Information asymmetries and information manipulation cannot be taken into account under this test. It was indicated that this test comes on top of the *necessity* test and the *chapeau* test, two other tests which have been used arbitrarily by the WTO DSM.

Confronted with yet another arbitrary test, State Parties to the GATT might be reluctant to consider taking any unilateral measures at all as a means to increase corporate accountability. Although decisions of the WTO DSM do not have *de jure* value, they have a kind of *de facto* value as interpretations of the GATT in practice.¹¹⁰ Indeed, both the Dutch Government and the European Commission have referred to the WTO DSM's interpretation of Article XX's *chapeau* as a reason why import restrictions (alongside accompanying measures) on products of child labour would be undesirable a mechanism of last resort.¹¹¹

It has been suggested that the WTO DSM should take the attitude-behaviour gap into account in future decisions. On the one hand, the WTO DSM should make its interpretation of the National Treatment Principle less extensive by not only taking consumption decisions into account. On the other hand, international norms should be taken into account to assess 'public morals'. ■

106 *Seal Panel*, supra note 9, paras. 7.292-7.2949; *Seal Appellate Body*, supra note 9, para. 5.143.

107 *Seal Panel*, *ibid.*, para 7.293 referring to Directive No. 83/129/EEC of 28 March 1983 concerning the Importation into Member States of Skins of certain Seal Pups and Products derived therefrom, OJ L 91, 9.4.1983, pp. 30-31, European Parliament Declaration on Banning Seal Products in the European Union (2006), P6_TA(2006)0369, <<http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+TA+P6-TA-2006-0369+0+DOC+PDF+V0//EN>> (last visited 16 April 2018) and UNHRC, United Nations Declaration on the Rights of Indigenous People (2006), UN Doc A/61/53.

108 *Seal Panel*, supra note 9, para. 4.377.

109 See E. Whitsitt, 'A Comment on the Public Morals Exception in International Trade and the EC-Seal Products Case: Moral Imperialism and Other Concerns', (2014) 3 *Cambridge Journal of International and Comparative Law*, no. 4, p 1379-1380.

110 Van Damme, supra note 60, pp. 612-614.

111 SWD(2013) 173 final, supra note 15, p. 12; Minbuza-2014.453878, supra note 1, p. 5.